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CHARLES ELMORE CROPLEY
CLERK

No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

MEMORANDUM IN RESPONSE TO APPELLEE'S "COUNTER-SHOWING AGAINST THE JURISDICTION OF THE COURT IN THIS CAUSE, WITH MOTION TO DISMISS BECAUSE OF THE WANT OF A SUBSTANTIAL FEDERAL QUESTION, AND MOTION TO AFFIRM"

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1. The sole ground upon which appellee attacks the jurisdiction of this Court to review the decree below is that "there is a lack of a substantial federal question."

In view of the statutes cited in the Statement of Jurisdiction (p. 2) and the rulings in the court below set forth both in the Statement of Jurisdiction (pp. 3–4) and the Statement of Points filed by

appellants (R. 509–510), we submit that the jurisdiction of this Court is indisputable.

The subject matter of the appeal is an alleged order of the Interstate Commerce Commission, which was assailed in the District Court by the appellee. There a decree was entered in favor of the appellee. The case was brought and the appeal is prosecuted under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (U. S. C., Title 28, § 41 (27 and 28); §§ 43 to 47), which provides in terms for a direct appeal to this Court from a final decree of the District Court enjoining, annulling, and restraining an order of the Commission. Appeal is not conditioned in such a case, as in cases from State courts brought here under Section 237, Judicial Code (U. S. C., Title 28, Sec. 344), upon the presence of a Federal question. The motion to dismiss should be denied.

2. Rule 7, Paragraph 4, of this Court provides that "the Court will receive a motion to affirm on the ground that * * * the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." It is on this ground that appellee's motion to affirm is based. But the appellee refers to no prior decision of this Court which controls or settles the questions involved on the appeal. It states merely that the case has been twice decided by the court below favorably to appellee. This is clearly no reason for classifying the appeal as frivolous.

Examination of the Government's Assignments of Error (R. 504–505) and its Statement of Points (R. 509–510) will disclose, we submit, that the questions presented by the appellee require "analysis and exposition for decision," and consequently are not frivolous. *Milheim* v. *Moffat Tunnel Dist.*, 262 U. S. 710, 716.

In the instant case the Commission wrote a report which contained its findings and which concluded by stating that the Commission would expect the appellee to set up its accounts within the period of sixty days in accordance therewith, but the Commission entered no order. The Government contended below that until the Commission had entered a definite order so commanding the doing by appellee of certain specific acts as to put it under compulsion and possibility of the penalties prescribed by the Act for disobedience of an order, there was no ground upon which the court could take jurisdiction of the suit. *United States* v. *Los Angeles & Salt Lake Railroad Co.*, 273 U. S. 299, and authorities therein cited. But the court overruled this contention and held that the report as written constituted an order.

It is also contended by the Government that the decision below encroaches upon the administrative authority expressly granted the Commission under Section 20 of the Interstate Commerce Act, as interpreted by this Court in *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, and results in substituting the court's judgment for the ad-

ministrative judgment of the Commission as to what the particular accounts prescribed by the Commission were intended by it to contain. In other words, the decision below substantially rewrites the rule prescribed by the Commission in its Account 41. (R. 435.) The purpose of this accounting rule clearly appears from the discussion of it by the Commission in its report. (R. 486.)

As in all cases involving the validity of orders of the Commission, the determination of the above questions depends largely upon a proper appreciation of the attendant facts. The case is one which should not be disposed of until the hearing on the merits. The motion to affirm should be denied.

Respectfully submitted.

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